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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADAM CLINTON LENTNER, Defendant and Appellant.	E049474 (Super.Ct.No. FWV802690) OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight III, Judge. Affirmed.

R. Clayton Seaman, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Adam Clinton Lentner appeals from his conviction on one count of felony vandalism (Pen. Code, § 594, subd. (b)(1)) and 180-day jail sentence. Defendant

argues: 1) the evidence seized from his home should have been suppressed because the search warrant contained both stale and false information; 2) the separate incidents of misdemeanor tagging should not have been aggregated into one felony count; 3) the jury instructions on aggregation were inadequate; and 4) the trial court should have but did not instruct the jury on the lesser included offense of misdemeanor vandalism, and this prejudiced defendant. As discussed below, we reject each of these contentions.

FACTS AND PROCEDURE

Between August 19 and October 6, 2008, graffiti abatement personnel in the City of Montclair found and removed 28 separate graffiti tags identifying the tagging crew as "OCP" and the individual tagger as "OCP Tails" or just "Tails." Each tag was made within three blocks of defendant's home. It costs the city about $70 to clean up each tagging incident, whether on public property or private property.

Police Officer Griffin has experience and specialized training in investigating graffiti. On September 18 or 19, 2008, Griffin accessed the City's "graffiti tracker" database, which uses a Global Positioning System (GPS) program to plot and record instances of graffiti as reported by the graffiti abatement team. Griffin found that defendant had a citation for tagging "OCP" and "Tails" at a local shopping center in 1999, and in the City of Ontario in 1998. A few days later, Griffin requested a search warrant for defendant's home. In the accompanying affidavit supporting probable cause for a search warrant, Griffin swore under oath in part: "Utilizing computer based search tools; your affiant located the vandal 'TAILS' from the [OCP] tagging crew. [Defendant]'s moniker is identified as 'TAILS' from prior arrest where he vandalized the

Montclair Plaza with 'TAILS' graffiti." Griffin did not specify that the prior arrest took place in 1999 instead of more recently. The magistrate issued the search warrant on September 23, 2008.

Police officers served the search warrant on October 2, 2008 and recovered the following items from defendant's home: stickers cut into the letters T, A, I, L and S; stickers that read "OCP tails"; a Taco Bell ID that read "Tails"; a poster with a red vehicle with a license plate that read "T-A-I-L-S"; a poster of a Porsche with the license plate "T-a-i-l-s"; a ceramic figurine of a Sonic the Hedgehog character named Tails; a piñata of the Tails character; and a poster of the Sonic the Hedgehog game with the character Tails on it. Police arrested defendant that morning.

On October 6, 2008, the People charged defendant in a felony complaint with one count of felony vandalism, i.e., vandalism causing damage in excess of $400.00. Defendant pled "not guilty." On November 25, 2008, defense counsel filed a "motion to quash and/or traverse the search warrant and suppress evidence pursuant to Penal Code § 1538.5," raising roughly the same issues as in this appeal. The People filed its opposition on December 3, 2008. The trial court denied the motion on December 5, 2008.

The presentation of evidence at the jury trial began on August 19, 2009. The People rested on August 20, 2009. The defense presented evidence on August 20 and 24 and rested on August 24. The jury deliberated less than two hours and returned with a guilty verdict. On October 15, 2009, the trial court sentenced defendant to 180 days in county jail and three years of probation. This appeal followed.

DISCUSSION

1. *Motion to Suppress Based on Stale Information in Search Warrant*

Defendant argues the search warrant was issued without probable cause and so the evidence obtained thereby should have been suppressed. Specifically, defendant contends: the information stating that defendant had used the moniker "Tails" nine years earlier was too old to link him to the 2008 tagging incidents; and 2) Officer Griffin purposely withheld the age of the information from the magistrate.

The freshness of information is one of the factors that determine whether there is probable cause to support issuance of a warrant. (*People v. Hernandez* (1974) 43 Cal.App.3d 581, 586.) No clear cut rule determines when the time span must be deemed too attenuated. (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393 (*Alexander*).)

In *Alexander*, information that defendant kept a stash of narcotics at her former residence one year previously was not sufficiently fresh to support issuance of a warrant to search her current residence. However, evidence that defendant here once used the moniker "TAILS" would lead one to believe he was still using that moniker when he started tagging in the same area. This is supported by Officer Griffin's stated opinion that a tagger's name is individual and that there are no duplicate names in the same area at the same time. We agree with the trial court that "it's an identification issue, and . . . that identification would probably never become stale." While we do recognize that nine years separates defendant's previous arrests from the 2008 tagging incidents, we have no trouble concluding that the identity of the "TAILS" moniker and the areas tagged between the two timeframes creates a reasonable inference that the two vandalism sprees

were committed by the same person, and thus established probable cause for issuing the search warrant.

2. *Aggregating Misdemeanor Tagging Incidents to Reach Felony Dollar Amount*

Defendant argues the trial court erred when it allowed the prosecution to combine 28 separate tagging incidents occurring over seven weeks into a single count to reach the $400 threshold required for felony vandalism.

After the close of evidence, the trial court and counsel discussed how to instruct the jury. On the issue of aggregation, the trial court concluded: "It's a decision for the jury ultimately whether to determine whether all these separate acts of vandalism are part of a single overall plan or objective, and you introduced evidence to the expert that it was. Whether or not they believe it or not, it's up to the jury really." As discussed below, we conclude that the trial court was correct.

In 1961, the California Supreme Court authorized the aggregation of separate acts of theft into a single offense for the purpose of bringing a felony allegation. (See *People v. Bailey* (1961) 55 Cal.2d 514, 519 (*Bailey*).) In 2008, Division One of this Court extended the *Bailey* doctrine to cases involving vandalism: "As with theft offenses, multiple instances of misdemeanor vandalism can be aggregated to form a single felony, unless 'the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan.' [Citation.]" (*In re Arthur V.* (2008) 166 Cal.App.4th 61, 69 (*Arthur V.*).)

"As *Bailey* emphasizes, the question of '[w]hether a series of wrongful acts constitutes a single offense or multiple offenses' requires a fact-specific inquiry that

depends on an evaluation of the defendant's intent. [Citation.] Such an inquiry is appropriately left to the fact finder in the first instance. [¶] As with other such factual questions, reviewing courts will affirm the fact finder's conclusion that the offenses are not 'separate and distinct,' and were 'committed pursuant to one intention, one general impulse, and one plan' so long as that conclusion is supported by substantial evidence. [Citations.]" (*Arthur V., supra,* 166 Cal.App.4th at pp. 61, 69.)

Here, the evidence showed that all of the charged acts of vandalism occurred against the same victim (ultimately, the City of Montclair, which incurred the expense of cleaning up the graffiti), within three blocks of defendant's home, and were discovered within a discret period of time, August 19 through October 6, 2008. The People's investigating officer and expert witness, Officer Griffin, testified that the reason taggers paint the name of their crew and their moniker in publicly viewable areas is to gain fame and publicity. "They're up to get their name up as many times as they can." "It's all about the fame. It's about how many times they can get their name up there and who can see it the most." The expert described a tagging spree as a "bombing run." This supports at least an inference that the tagging occurred according to a single intent, impulse and plan. Thus, under both *Bailey* and *Arthur V.*, the trial court properly left the determination to the finder of fact in this case—the jury.

3. Jury Instructions on Aggregating Tagging Incidents

Defendant contends the trial court erred when it instructed the jury that, in order to find him guilty of the felony, it must find that he vandalized multiple properties as part of

"a single, overall plan or objective."[1] Defendant argues that, instead, the instruction should have used the exact phrase "one intention, one general impulse, and one plan" as set forth in *Bailey*.

This argument is without merit. The trial court adapted the challenged instruction directly from Judicial Council of California Criminal Jury Instructions CALCRIM No. 1802, which allows a jury to combine multiple petty thefts into a single grand theft where "The defendant obtained the property as part of a single, overall plan or objective."[2] In turn, this language is derived directly from *Bailey*, as set forth in the annotations to CALCRIM No. 1802. Defendant cites to no legal authority disapproving of the language used in CALCRIM No. 1802, and we could find none. Thus, the trial court did not err in instructing the jury as it did.

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[1] The trial court gave the jury the following written instruction: "If you conclude that the defendant committed more than one act of vandalism, you must then decide whether the defendant committed multiple vandalisms or a single vandalism over $400. To prove that the defendant is guilty of vandalism over $400 damage, the People must prove that: [¶] 1) The defendant committed vandalism of property on more than one occasion; [¶] 2) The combined value of the damage was equal to or over $400; [¶] AND [¶] 3) The defendant vandalized the property as part of a single, overall plan or objective."

[2] CALCRIM No. 1802 reads in full: "If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grant theft. To prove that the defendant is guilty of a single grand theft, the People must prove that: [¶] 1) The defendant committed theft of property from the same owner or possessor on more than one occasion; [¶] 2) The combined value of the property was over ($400/$100); [¶] AND [¶] 3) The defendant obtained the property as part of a single, overall plan or objective. [¶] If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts."

4. Misdemeanor Vandalism as Lesser Included Charge

Defendant also contends the trial court should have instructed the jury on misdemeanor vandalism as a lesser included offense in case the jury chose not to aggregate the incidents into one felony offense.

"'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, evidence that a reasonable jury could find persuasive'" [citation], which, if accepted, "'would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*" [citation].' [Citation.] '[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]' [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

As set forth in the previous footnote, the instructions to this jury omitted the following directive from CALCRIM No. 1802: "If you conclude that the People have failed to prove [grand theft/felony vandalism], any multiple [thefts/vandalisms] you have found proven are [petty thefts/misdemeanor vandalisms]." In addition, the verdict forms did not indicate to the jury that they had the option of convicting defendant of only misdemeanor vandalism based on one or more of the 28 separate tagging incidents if they found the tagging had not been committed "as part of a single, overall plan or

objective."[3] Verdict form 1-A concerned whether defendant committed the crime of vandalism in the first place: "We, the jury in the above-entitled action, find the defendant, ADAM CLINTON LENTNER, GUILTY of the crime of VANDALISM, as charged in Count 1 of the information." Verdict form I-B would have been used had the jury found defendant not guilty of vandalism. The second verdict form, entitled "Vandalism Allegation as to Count 1" stated: "We, the jury in the above-entitled action, find that the damage in Count 1 is EQUAL TO OR GREATER THAN $400, in the above offense as to ADAM CLINTON LENTNER in Count 1."

The trial court considered whether to give this portion of the standard instruction, but decided not to. The court reasoned that "If they don't find it's over $400, then it's a misdemeanor by operation of law. So we're, in effect, giving them the lesser." The court then said to defense counsel, "I'm comfortable doing it that way, especially in this case where you're arguing he did not do it. You're not arguing it didn't cause $2,000 worth of damage." Defense counsel replied, "I'll argue what I have to argue." Defense counsel

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[3] Jury Instruction No. 28 summarizes the questions put to the jury: "In this case your verdict maybe in one of the following forms as to Count 1: [¶] 1-A [¶] We, the jury in the above-titled action, find the defendant, ADAM CLINTON LENTER, GUILTY of the crime of VANDALISM as charged in Count 1 of the information; or, [¶] 1-B [¶] We, the jury in the above-entitled action, find the defendant, ADAM CLINTON LENTNER, NOT GUILTY of the crime of VANDALISM. [¶] In this case, your finding may be in one of the following forms as to the VANDALISM allegation, as to Count 1: [¶] VANDALISM ALLEGATION AS TO COUNT 1 [¶] We, the jury in the above-entitled action, find that the damage in Count 1 is EQUAL TO OR GREATER THAN $400, in the above offense, as to ADAM CLINTON LENTNER in Count 1; [¶] ( ) TO BE TRUE [¶] or [¶] ( ) TO BE NOT TRUE

ultimately argued that defendant did not commit the vandalism at all, and did not address whether the separate instances should be aggregated.

In this appeal, the People assert "the jury specifically had the option of convicting appellant of misdemeanor vandalism." We disagree, because we cannot find anything in the record that tells the jury defendant is still guilty of misdemeanor vandalism if the jury finds the $400 damage allegation to be untrue. Even if the "jury specifically had the option," and even though the trial court believed an untrue finding would result in a misdemeanor conviction "as a matter of law," no one bothered to tell the jury this. Thus, the trial court erred in failing to instruct the jury that it could find defendant guilty of misdemeanor vandalism if the jury chose not to aggregate the separate incidents.

Next, we determine whether the trial court's error was harmless. A trial court's failure to instruct on all lesser included offenses that are supported by the evidence "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) We have reviewed the record and cannot conclude that the error affected the outcome. This is because, as discussed above, the evidence is overwhelming that defendant committed the 28 acts of vandalism as part of a single, overall plan or objective. That plan or objective was simple, and quite singular—to gain fame for defendant as an individual tagger and fame for his tagging crew. The evidence, in the form of the expert opinion of Officer Griffin, shows that the plan or objective did not change from one tagging incident to another, and did not vary depending on the date or location of the tagging. Thus, we conclude that, even if the jury had been properly

instructed to allow it to convict defendant of misdemeanor vandalism, it is not reasonably probable that it would have done so. The error was therefore harmless.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

McKINSTER
J.